

No. 2470

United States
Circuit Court of Appeals
For the Ninth Circuit

OREGON-WASHINGTON RAILROAD & NAVI-
GATION COMPANY, a Corporation,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

Transcript of Record

**Upon Writ of Error to the United States District Court
for the Eastern District of Washington,
Northern Division.**

Filed

SEP 1 - 1914

F. D. Monckton,
Clerk.

NO. _____

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Names and Addresses of Attorneys of Record

ARTHUR C. SPENCER, Wells Fargo Building, Portland, Oregon, and

HAMBLEN & GILBERT, Paulsen Building, Spokane, Washington,

Attorneys for Plaintiff in Error.

FRANCIS A. GARRECHT, U. S. Attorney, Federal Building, Spokane, Washington, and

OTIS B. KENT, Special Assistant United States Attorney, Washington, D. C.,

Attorneys for Defendant in Error.

In the District Court of the United States, Eastern District of Washington, Northern Division.

No. 1751.

UNITED STATES OF AMERICA,

Plaintiff,

v's.

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, a Corporation,

Defendant.

Complaint

Now comes the United States of America, by Oscar Cain, United States Attorney for the Eastern District of Washington, and brings this action on behalf of the United States against the Oregon-

Washington Railroad & Navigation Company, a corporation organized and doing business under the laws of the state of Oregon, and having an office and place of business at Wallula, in the state of Washington; this action being brought upon suggestion of the Attorney General of the United States at the request of the Interstate Commerce Commission, and upon information furnished by said Commission.

FOR A FIRST CAUSE OF ACTION, plaintiff alleges that defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the state of Washington.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), defendant, during the twenty-four hour period beginning at the hour of 7:00 o'clock A. M., on April 21, 1913, at its office and station at Wallula, in the State of Washington, and within the jurisdiction of this court, required and permitted its certain telegraph operator and employee, to-wit: M. W. Longabaugh, to be and remain on duty for a longer period than nine hours in said twenty-four hour period, to-wit: from said hour of 7:00 o'clock A. M., on said date, to the hour of 12:00 o'clock m'night on said date.

Plaintiff further alleges that during all the times mentioned herein said office and station was one

continuously operated night and day, and that said employee, while required and permitted to be and remain on duty as aforesaid, by the use of the telegraph or telephone, dispatched, reported, transmitted, received, and delivered orders pertaining to and affecting the movement of trains engaged in interstate commerce.

Plaintiff further alleges that by reason of the violation of said Act of Congress, defendant is liable to plaintiff in the sum of Five Hundred Dollars.

FOR A SECOND CAUSE OF ACTION, plaintiff alleges that defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the state of Washington.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), defendant, during the twenty-four hour period beginning at the hour of 7:00 o'clock A. M., on April 22, 1913, at its office and station at Wallula, in the State of Washington, and within the jurisdiction of this court, required and permitted its certain telegraph operator and employee, to-wit: M. W. Longabaugh, to be and remain on duty for a longer period than nine hours in said twenty-four hour period, to-wit: from said hour of 7:00 o'clock A. M., on said date, to the hour of 12:00 o'clock m'night on said date.

Plaintiff further alleges that during all the times mentioned herein said office and station was one continuously operated night and day, and that said employee, while required and permitted to be and remain on duty as aforesaid, by the use of the telegraph or telephone, dispatched, reported, transmitted, received, and delivered orders pertaining to and affecting the movement of trains engaged in interstate commerce.

Plaintiff further alleges that by reason of the violation of said Act of Congress, defendant is liable to plaintiff in the sum of Five Hundred Dollars.

FOR A THIRD CAUSE OF ACTION, plaintiff alleges that defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the state of Washington.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), defendant, during the twenty-four hour period beginning at the hour of 7:00 o'clock A. M., on April 23, 1913, at its office and station at Wallula, in the State of Washington, and within the jurisdiction of this court, required and permitted its certain telegraph operator and employee, to-wit: M. W. Longabaugh, to be and remain on duty for a longer period than nine hours in said twenty-four hour period, to-wit: from said hour of 7:00 o'clock A. M.,

on said date, to the hour of 12:00 o'clock m'night on said date.

Plaintiff further alleges that during all the times mentioned herein said office and station was one continuously operated night and day, and that said employee, while required and permitted to be and remain on duty as aforesaid, by the use of the telegraph or telephone, dispatched, reported, transmitted, received, and delivered orders pertaining to and affecting the movement of trains engaged in interstate commerce.

Plaintiff further alleges that by reason of the violation of said Act of Congress, defendant is liable to plaintiff in the sum of Five Hundred Dollars.

FOR A FOURTH CAUSE OF ACTION, plaintiff alleges that defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the state of Washington.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415,) defendant, during the twenty-four hour period beginning at the hour of 7:00 o'clock A. M., on April 24, 1913, at its office and station at Wallula, in the State of Washington, and within the jurisdiction of this court, required and permitted its certain telegraph operator and employee, to-wit: M. W. Longabaugh, to be and remain on duty for

a longer period than nine hours in said twenty-four hour period, to-wit: from said hour of 7:00 o'clock A. M., on said date, to the hour of 12:00 o'clock m'night on said date.

Plaintiff further alleges that during all the times mentioned herein said office and station was one continuously operated night and day, and that said employee, while required and permitted to be and remain on duty as aforesaid, by the use of the telegraph or telephone, dispatched, reported, transmitted, received, and delivered orders pertaining to and affecting the movement of trains engaged in interstate commerce.

Plaintiff further alleges that by reason of the violation of said Act of Congress, defendant is liable to plaintiff in the sum of Five Hundred Dollars.

FOR A FIFTH CAUSE OF ACTION,

plaintiff alleges that defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the state of Washington.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415,) defendant, during the twenty-four hour period beginning at the hour of 7:00 o'clock A. M., on April 25, 1913, at its office and station at Wallula, in the State of Washington, and within the jurisdiction of this court, required and permitted its

certain telegraph operator and employee, to-wit M. W. Longabaugh, to be and remain on duty for a longer period than nine hours in said twenty-four hour period, to-wit: from said hour of 7:00 o'clock A. M., on said date, to the hour of 12:00 o'clock m'night on said date.

Plaintiff further alleges that during all the times mentioned herein said office and station was one continuously operated night and day, and that said employee, while required and permitted to be and remain on duty as aforesaid, by the use of the telegraph or telephone, dispatched, reported, transmitted, received, and delivered orders pertaining to and affecting the movement of trains engaged in interstate commerce.

Plaintiff further alleges that by reason of the violation of said Act of Congress, defendant is liable to plaintiff in the sum of Five Hundred Dollars.

FOR A SIXTH CAUSE OF ACTION, plaintiff alleges that defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Washington.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), defendant, during the twenty-four hour period beginning at the hour of 7:00 o'clock A. M., on April 26, 1913, at its office and station

at Wallula, in the State of Washington, and within the jurisdiction of this court, required and permitted its certain telegraph operator and employee, to-wit: M. W. Longabaugh, to be and remain on duty for a longer period than nine hours in said twenty-four hour period, to-wit: from said hour of 7:00 o'clock A. M., on said date, to the hour of 12:00 o'clock m'night on said date.

Plaintiff further alleges that during all the times mentioned herein said office and station was one continuously operated night and day, and that said employee, while required and permitted to be and remain on duty as aforesaid, by the use of the telegraph or telephone, dispatched, reported, transmitted, received, and delivered orders pertaining to and affecting the movement of trains engaged in interstate commerce.

Plaintiff further alleges that by reason of violation of said Act of Congress, defendant is liable to plaintiff in the sum of Five Hundred Dollars.

FOR A SEVENTH CAUSE OF ACTION, plaintiff alleges that defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Washington.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), defendant, during the twenty-

four hour period beginning at the hour of 7:00 o'clock A. M., on April 27, 1913, at its office and station at Wallula, in the State of Washington, and within the jurisdiction of this court, required and permitted its certain telegraph operator and employee, to-wit: M. W. Longabaugh, to be and remain on duty for a longer period than nine hours in said twenty-four hour period, to-wit: from said hour of 7:00 o'clock A. M., on said date, to the hour of 12:00 o'clock m'night on said date.

Plaintiff further alleges that during all the times mentioned herein said office and station was one continuously operated night and day, and that said employee, while required and permitted to be and remain on duty as aforesaid, by the use of the telegraph or telephone, dispatched, reported, transmitted, received, and delivered orders pertaining to and affecting the movement of trains engaged in interstate commerce.

Plaintiff further alleges that by reason of violation of said Act of Congress, defendant is liable to plaintiff in the sum of Five Hundred Dollars.

FOR AN EIGHTH CAUSE OF ACTION, plaintiff alleges that defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Washington.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon,"

approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), defendant, during the twenty-four hour period beginning at the hour of 7:00 o'clock A. M., on April 28, 1913, at its office and station at Wallula, in the State of Washington, and within the jurisdiction of this court, required and permitted its certain telegraph operator and employee, to-wit: M. W. Longabaugh, to be and remain on duty for a longer period than nine hours in said twenty-four hour period, to-wit: from said hour of 7:00 o'clock A. M., on said date, to the hour of 12:00 o'clock m'night on said date.

Plaintiff further alleges that during all the times mentioned herein said office and station was one continuously operated night and day, and that said employee, while required and permitted to be and remain on duty as aforesaid, by the use of the telegraph or telephone, dispatched, reported, transmitted, received, and delivered orders pertaining to and affecting the movement of trains engaged in interstate commerce.

Plaintiff further alleges that by reason of violation of said Act of Congress, defendant is liable to plaintiff in the sum of Five Hundred Dollars.

FOR A NINTH CAUSE OF ACTION, plaintiff alleges that defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Washington.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the

safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), defendant, during the twenty-four hour period beginning at the hour of 7:00 o'clock A. M., on April 29th, 1913, at its office and station at Wallula, in the State of Washington, and within the jurisdiction of this court, required and permitted its certain telegraph operator and employee, to-wit: M. W. Longabaugh, to be and remain on duty for a longer period than nine hours in said twenty-four hour period, to-wit: from said hour of 7:00 o'clock A. M., on said date, to the hour of 12:00 o'clock m'night on said date.

Plaintiff further alleges that during all the times mentioned herein said office and station was one continuously operated night and day, and that said employee, while required and permitted to be and remain on duty as aforesaid, by the use of the telegraph or telephone, dispatched, reported, transmitted, received, and delivered orders pertaining to and affecting the movement of trains engaged in interstate commerce.

Plaintiff further alleges that by reason of violation of said Act of Congress, defendant is liable to plaintiff in the sum of Five Hundred Dollars.

FOR A TENTH CAUSE OF ACTION,

plaintiff alleges that defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Washington.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), defendant, during the twenty-four hour period beginning at the hour of 7:00 o'clock A. M., on April 30th, 1913, at its office and station at Wallula, in the State of Washington, and within the jurisdiction of this court, required and permitted its certain telegraph operator and employee, to-wit: M. W. Longabaugh, to be and remain on duty for a longer period than nine hours in said twenty-four hour period, to-wit: from said hour of 7:00 o'clock A. M., on said date, to the hour of 12:00 o'clock m'night on said date.

Plaintiff further alleges that during all the times mentioned herein said office and station was one continuously operated night and day, and that said employee, while required and permitted to be and remain on duty as aforesaid, by the use of the telegraph or telephone, dispatched, reported, transmitted, received, and delivered orders pertaining to and affecting the movement of trains engaged in interstate commerce.

Plaintiff further alleges that by reason of violation of said Act of Congress, defendant is liable to plaintiff in the sum of Five Hundred Dollars.

WHEREFORE plaintiff prays for judgment against the defendant in the sum of five thousand dollars and its costs herein expended.

(Signed) OSCAR CAIN,
United States Attorney.

Endorsements: Complaint.

Filed in the U. S. District Court for the Eastern District of Washington, August 4, 1913.

W. H. HARE, Clerk.

By Frank C. Nash, Deputy.

In the District Court of the United States, Eastern District of Washington, Northern Division.

No. 1751.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, a Corporation,

Defendant,

Answer

Now comes the Oregon-Washington Railroad & Navigation Company, by its attorneys, and for its answer to the complaint of the plaintiff herein, admits, denies and alleges as follows:

Denies each and every allegation contained in the plaintiff's first to tenth causes of action inclusive, and every part and parcel thereof, except that defendant admits that one M. W. Longabaugh did work at Wallula, Washington, from the hour of 7 o'clock a. m., to the hour of 12 o'clock midnight, on each of the days from April 21, 1913, to April 30, 1913, both days inclusive, and further excepting as hereinafter alleged.

Defendant for a further and separate answer to each of said ten causes of action, alleges:

I.

That the defendant is a corporation organized under the laws of the State of Oregon, and was, during all the times and dates in the complaint mentioned, a common carrier, engaged in interstate commerce by railroad in the state of Washington.

II.

M. W. Longabaugh, during the dates and time mentioned in the complaint, was employed by the defendant as station agent at the station of Wallula, in the state of Washington.

During said dates from April 21 to April 30, 1913, both days inclusive, it became necessary for the defendant, and for good cause, to discharge one of its telegraph operators and employees, with the result that the defendant had only two telegraph operators for the performance of the duties of telegraphing at said station during said time; that the defendant inquired at various places likely to enable it to obtain an additional operator, to-wit: at Portland, Ore., The Dalles, Pendleton, La Grande, Walla Walla, Spokane, and elsewhere, but was unable to secure the services of an operator during said time, and did thereupon direct the said M. W. Longabaugh to work three hours as a station agent, and six hours as a telegraph operator, making a total period of nine hours in each twenty-four hour period, but that the said M. W. Longabaugh, without the knowledge of the defendant or any of its officers or agents, and against its will and consent, did erroneously construe said directions as to his work, and did work twelve hours as a station agent and six hours as an operator, making a total

of eighteen hours in each 24-hour period, and did so continue to work from the 21st day of April, 1913, to the 30th day of April, 1913, at which time the fact of the service of the said Longabaugh was discovered by and became known to the defendant, at which time said work of the said Longabaugh immediately ceased, and was caused to be discontinued by the direct action of the defendant and its officers and agents, and that in no instance did this defendant or any of its officers or agents require or permit with its knowledge or consent, the said Longabaugh to perform any service as a telegraph operator for a longer period than six hours in any 24-hour period between said dates or any other time.

WHEREFORE, defendant prays that plaintiff take nothing by its complaint; that the same be dismissed, and the defendant allowed to go hence without day.

(Signed) W. W. COTTON,

(Signed) A. C. SPENCER,

(Signed) HAMBLÉN & GILBERT,

(Signed) O. E. COCHRAN,

Attorneys for Defendant.

State of Oregon, County of Multnomah,—ss.

A. C. Spencer, being first duly sworn, deposes and says: That he is general attorney for the Oregon-Washington Railroad & Navigation Company, corporation defendant above named; that he has read the foregoing answer, knows the contents thereof, and that the same is true as he verily believes.

(Signed) A. C. SPENCER.

Subscribed and sworn to before me this 19th day of August, 1913.

(Signed) C. E. COCHRAN,

Notary Public for Oregon.

Endorsements: Service by copy admitted at Spokane, Wn., Aug. 21, 1913.

(Signed) OSCAR CHAIN,

Attorney for Plaintiff.

Answer.

Filed in the U. S. District Court for the Eastern District of Washington, August 21, 1913.

W. H. HARE, Clerk.

By Frank C. Nash, Deputy.

*In the District Court of the United States, Eastern
District of Washington, Northern Division.*

No. 1751.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD & NAVI-
GATION COMPANY, a Corporation,

Defendant,

Stipulation

IT IS HEREBY STIPULATED, that the Oregon-Washington Railroad & Navigation Company, is and was during the time hereinafter specified, a common carrier by railroad, incorporated, organized, existing and doing business under the laws of the State of Oregon, and having an office and place of business at Wallula, in the State of Washington, and within

the jurisdiction of this court; and that it is and was during said time engaged in interstate commerce;

That on April 21, 1913, and on each of the nine succeeding days thereafter, to and including April 30, 1913, a certain employee of the said defendant, to-wit: M. W. Longabaugh, was and remained on duty as the agent of the said defendant at the said Wallula, from 7:00 A. M. to 7:00 P. M., on each of said dates, and thereafter remained on duty as a telegraph operator at the said Wallula, a continuously operated day-and-night office or station of the said defendant from 7:00 P. M. to 12 o'clock midnight, on each of said dates; and that the said M. W. Longabaugh was then and there engaged in the handling of orders pertaining to or affecting the movement of trains engaged in interstate commerce; that on said 21st day of April, 1913, and before he had performed any excess service, the said Longabaugh was instructed by his superior officer, not to work in excess of nine hours in any twenty-four hour period, either as agent or operator or in both capacities; that the said Longabaugh remained on duty longer than ^{nine} ~~twenty-~~ ~~four~~ hours as aforesaid in violation of said instructions, and without the actual knowledge of the superior officers of said Longabaugh.

Dated at Spokane, Washington, this 20th day of April, 1914.

(Signed) FRANCIS A. GARRECHT,

By O. B. KENT, Special Asst. U. S. Attorney,

Attorneys for Plaintiff.

(Signed) HAMBLIN & GILBERT,

Attorneys for Defendant.

Endorsements: Stipulation.

Filed in the U. S. District Court for the Eastern
District of Washington, April 20, 1914.

W. H. HARE, Clerk.

*In the District Court of the United States, Eastern
District of Washington, Northern Division.*

No.-----

UNITED STATES OF AMERICA,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD & NAVI-
GATION COMPANY, a Corporation,

Defendant,

Stipulation Waiving Jury

It is hereby stipulated and agreed between the
above named parties that the above-entitled cause may
be submitted to the court, and the trial of said cause
by jury is hereby expressly waived.

(Signed) A. C. SPENCER and
HAMBLEN & GILBERT,
Attorneys for Defendant.

(Signed) FRANCIS A. GARRECHT and
OTIS B. KENT,
Attorneys for Plaintiff.

Endorsements: Stipulation Waiving Jury.

Filed in the U. S. District Court for the Eastern
District of Washington, April 20, 1914.

W. H. HARE, Clerk.

By Frank C. Nash, Deputy.

*In the District Court of the United States, Eastern
District of Washington, Northern Division.*
No. 1751.

UNITED STATES OF AMERICA,

Plaintiff,

v.s.

OREGON-WASHINGTON RAILROAD & NAVI-
GATION COMPANY, a Corporation,

Defendant,

Opinion

FRANCIS A. GARRECHT, U. S. Atty., and
OTIS B. KENT, Spec. Asst. to U. S. Atty., for
Plaintiff.

HAMBLÉN & GILBERT, for defendant.

RUDKIN, District Judge.

This is an action to recover penalties for violation of the Act of Congress of March 4, 1907, entitled, "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," (34 Stat., 1415) commonly known as, "The Hours of Service Act." The complaint contains ten counts or causes of action in all, the first based on excessive hours of service by an employee named Longabaugh on the 21st day of April, 1913, and the remaining nine on excessive hours of service by the same employee on the nine succeeding days. When the case was called for trial a jury was impaneled and sworn, but the parties thereafter agreed upon the facts and the jury was discharged by consent and the cause submitted to the court on a written stipulation. From this stipu-

lation it appears that the defendant corporation is a common carrier by railroad engaged in interstate commerce; that Wallula, an office on its line of railway, is a station continuously operated night and day; that on the 21st day of April, 1913, and on each of the nine succeeding days the employee Longabaugh went on duty as agent at that place at the hour of seven o'clock A. M. and remained on duty continuously as such agent until the hour of seven o'clock, P. M. and thereafter remained on duty continuously as a telegraph operator and, by use of the telegraph, dispatched, reported, transmitted, received and delivered orders pertaining to or affecting train movements until the hour of twelve o'clock midnight; that before the employee Longabaugh had performed any excessive hours of service he was instructed by his superior officer not to work in excess of nine hours in any twenty-four hour period, either as agent or operator or in both capacities, and that he remained on duty for a longer period than nine successive hours in violation of such instructions and without the actual knowledge of his superior officers. The sole question presented for decision, therefore, is, did the instructions to the employee not to violate the law, or want of knowledge of a violation of the law on the part of his superior officers constitute a defense.

It is now well settled that the Safety Appliance Act and kindred statutes impose positive and absolute duties on carriers the non-performance of which is not excused by the exercise of reasonable diligence

or due care on their part, and the Hours of Service Act admits of no other rational construction.

St. Louis & Iron Mountain Railway v. Taylor,
210 U. S., 281.

C. B. & Q. Railway v. United States, 220
U. S., 559.

Delk v. St. Louis & San Francisco R. R.,
220 U. S., 580.

It is urged that the words "require or permit" imply consent or knowledge on the part of the employer, and this is perhaps their common significance, but the word "permit" also means a failure to prohibit by one who has the power and authority to do so, and in my opinion the term is here used in the latter sense.

In *United States v. San Francisco Bridge Company*, 88 Federal 891, cited by the defendant, section 2 of the Act under consideration expressly provided:

"That any officer or agent of the government of the United States or of the District of Columbia, or any contractor or sub-contractor whose duty it shall be to employ, direct or control any laborer or mechanic employed upon any of the public works of the United States or of the District of Columbia, who shall intentionally violate any provisions of this act, shall be guilty of a misdemeanor."

The criminal intent was there made a part of the offense by express legislative enactment and the word "permit" was of necessity given the meaning here contended for by the defendant. But the act now under consideration expressly provides in section 3 that:

"In all prosecutions under this act the common carrier shall be deemed to have had knowledge of all acts of all its officers and agents," and this provision eliminates all questions of knowledge or criminal intent.

Nor can the expression, "all its officers and agents," be limited to general officers and agents as claimed by the defendant. The knowledge of such general officers or agents is imputed to the company by the common law, and it is very apparent that the statute in question is not merely declaratory of the common law. As said by the court in the Taylor case, *supra*:

"In the case before us the liability of the defendant does not grow out of the common law duty of master to servant. The Congress, not satisfied with the common law duty and its resulting liability, has prescribed and defined the law by statute. We have nothing to do but to ascertain and declare the meaning of a few simple words in which the duty is described. It is enacted that 'no cars, either loaded or unloaded shall be used in interstate traffic which do not comply with the standard.' There is no escape from the meaning of these words. Explanation cannot clarify them, and ought not to be employed to confuse them or lessen their significance. The obvious purpose of the legislature was to supplant the qualified duty of the common law with an absolute duty deemed by it more just. If the railroad does, in point of fact, use cars which do not comply with the standard, it violates the plain prohibitions of the law, and there arises from that violation the liability

to make compensation to one who is injured by it. It is urged that this is a harsh construction. To this we reply that, if it be the true construction, its harshness is no concern of the courts. They have no responsibility for the justice or wisdom of legislation, and no duty except to enforce the law as it is written, unless it is clearly beyond the constitutional power of the lawmaking body. It is said that the liability under the statute, as thus construed, imposes so great a hardship upon the railroads that it ought not to be supposed that Congress intended it. Certainly the statute ought not to be given an absurd or utterly unreasonable interpretation leading to hardship and injustice, if any other interpretation is reasonably possible. But this argument is a dangerous one, and never should be heeded where the hardship would be occasional and exceptional. It would be better, it was once said by Lord Eldon, to look hardship in the face rather than break down the rules of law. But when applied to the case at bar the argument of hardship is plausible only when the attention is directed to the material interest of the employer to the exclusion of the interests of the employee and of the public. Where an injury happens through the absence of a safe draw bar there must be hardship. Such an injury must be an irreparable misfortune to some one. If it must be borne entirely by him who suffers it, that is a hardship to him. If its burden is transferred, as far as it is capable of transfer, to the employer, it is a hardship to him. It is quite conceivable that Congress, contemplating the inevitable hardship of such injuries, and hoping to

diminish the economic loss to the community resulting from them, should deem it wise to impose their burdens upon those who could measurably control their causes, instead of upon those who are in the main helpless in that regard. Such a policy would be intelligible, and, to say the least, not so unreasonable as to require us to doubt that it was intended, and to seek some unnatural interpretation of common words."

For these reasons I am of the opinion that the knowledge of the agent Longabaugh was the knowledge of the company and that the instructions given by his superior officer not to work excessive hours, or a want of knowledge on the part of his superior officers that he did in fact work excessive hours is no defense. I therefore adjudge the defendant guilty on all counts and impose a fine of \$100.00 and costs for each violation.

Endorsements: Opinion.

Filed in the U. S. District Court for the Eastern District of Wasihnhton, April 23, 1914.

W. H. HARE, Clerk.

By Frank C. Nash, Deputy.

*In the District Court of the United States, Eastern
District of Washington, Northern Division.*

No. 1751.

UNITED STATES OF AMERICA,

Plaintiff,

v's.

OREGON-WASHINGTON RAILROAD & NAVI-
GATION COMPANY, a Corporation,

Defendant,

Judgment

The above matter having come on for trial on the 20th day of April, 1914, the plaintiff being represented by Francis A. Garrecht, United States Attorney for the Eastern District of Washington, and Otis B. Kent, Special Assistant United States Attorney, and the defendant being represented by Hamblen & Gilbert, its attorneys, and trial by jury having been waived by the parties hereto after having been duly and regularly impaneled and sworn, and the case submitted to the court upon an agreed statement of facts; and the court having listened to arguments of counsel for the respective parties, and having filed its opinion finding the defendant guilty as charged in the complaint herein, it is, therefore,

ORDERED and ADJUDGED that the defendant, Oregon-Washington Railroad & Navigation Company, be, and the same is hereby fined in the sum of One Thousand (\$1000.00) Dollars, being One Hundred (\$100.00) Dollars for each cause of action set forth in the complaint; and it is further

ORDERED and ADJUDGED that the plaintiff, United States of America, do have and recover of

and from the said defendant its costs and disbursements herein incurred, taxed by the clerk in the sum of \$44.43.

Done in open court this 27th day of May, 1914.

(Signed) FRANK H. RUDKIN,

Judge.

Endorsements: Judgment.

Filed in the U. S. District Court for the Eastern District of Washington, May 27, 1914.

W. H. HARE, Clerk.

By Frank C. Nash, Deputy.

In the District Court of the United States, Eastern District of Washington, Northern Division.

No. 1751.

UNITED STATES OF AMERICA,

Plaintiff.

vs.

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, a Corporation,

Defendant.

**Stipulation for Serving and Filing Proposed Bill
of Exceptions**

It is hereby STIPULATED, and agreed, by and between the above named parties, that the above named defendant may have until June 10th, 1914, within which to serve and file its proposed Bill of Exceptions herein.

Dated at Spokane, Washington, this 7th day of May, 1914.

(Signed) FRANCIS A. GARRECHT,

Attorney for Plaintiff,

(Signed) HAMBLÉN & GILBERT,

Attorneys for Defendant.

Endorsements: Stipulation Extending Time for
Preparing Proposed Bill of Exceptions.

Filed in the U. S. District Court for the Eastern
District of Washington, May 7, 1914.

W. H. HARE, Clerk.

By Frank C. Nash, Deputy.

*In the District Court of the United States, Eastern
District of Washington, Northern Division.*

No. 1751.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD & NAVI-
GATION COMPANY, a Corporation,

Defendant.

At Law—Bill of Exceptions

BE IT REMEMBERED, that on the 20th day of April, 1914, at Spokane, Washington, the above entitled action came regularly on for trial before the Honorable Frank H. Rudkin, District Judge, the Plaintiff appearing by Francis A. Garrecht, United States Attorney, and Otis B. Kent, Special Assistant to United States Attorney, and the defendant appearing by Hamblen & Gilbert, its attorneys; a jury was duly impaneled and sworn to try the cause, after which counsel for the respective parties agreed upon the facts and embodied the same in a stipulation, the original of which is on file herein, as follows:

"IT IS HEREBY STIPULATED, that the Oregon-Washington Railroad & Navigation Company, is and was during the time hereinafter specified a common carrier by railroad, incorporated, organized, existing and doing business under the laws of the State of Oregon, and having an office and place of business at Wallula, in the State of Washington, and within the jurisdiction of this Court; and that it is and was during said time engaged in interstate commerce;

That on April 21st, 1913, and on each of the nine succeeding days thereafter, to and including April 30th, 1913, a certain employee of the said defendant, to-wit: M. W. Longabaugh, was and remained on duty as the agent of the said defendant at the said Wallula, from 7:00 A. M. to 7:00 P. M., on each of said dates, and thereafter remained on duty as a telegraph operator at the said Wallula, a continuously operated day-and-night office or station of the said defendant from 7:00 P. M. to 12:00 o'clock midnight, on each of said dates; and that the said M. W. Longabaugh was then and there engaged in the handling of orders pertaining to or affecting the movement of trains engaged in interstate commerce; that on said 21st day of April, 1913, and before he had performed any excess service, the said Longabaugh was instructed by his superior officer, not to work in excess of nine hours in any twenty-four hour period, either as agent or operator or in both capacities; that the said Longabaugh remained on duty longer than twenty-four hours as aforesaid in violation of

said instructions, and without the actual knowledge of the superior officers of said Longabaugh.

Dated at Spokane, Washington, this 20th day of April, A. D. 1914.

O. B. Kent, Attorney for Plaintiff.

Hamblen & Gilbert, Attorneys for Defendant.

Thereupon the jury was discharged from further consideration of the case and same was submitted to the court upon the petition and motion of the defendant that judgment be entered in favor of the defendant upon the ground and for the reason that upon the admitted and stipulated facts in the case, no violation of the law upon which the cause of action herein is based, has been established, but to the contrary, plaintiff has failed to make out or establish its cause of action upon any count alleged. The court having heard argument of counsel and having taken the case under advisement, denied such contention of the defendant and overruled its motion, to which ruling of the court the defendant notes its exception, and said exception is now allowed by the court and said court thereupon entered judgment in favor of the plaintiff and assessed a fine of \$100.00 for each count set forth in the complaint herein, being a total fine of \$1000 00, together with costs and disbursements of the plaintiff.

*In the District Court of the United States, Eastern
District of Washington, Northern Division.*

No. 1751.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD & NAVI-
GATION COMPANY, a Corporation,

Defendant.

AT LAW.

Stipulation Concerning Bill of Exceptions

It is hereby stipulated and agreed, by and between the plaintiff and the defendant, in the above entitled cause, by their respective attorneys, that the bill of exceptions hereto attached embodies all of the exceptions proposed by either party herein to said cause, and that there are no amendments or proposed amendments thereto; that said bill of exceptions may be settled by the Judge of said court in the manner provided by the rules of said court without objection by either party hereto.

Dated this 29th day of June, A. D. 1914.

(Signed) FRANCIS A. GARRECHT,

U. S. Attorney,

OTIS B. KENT,

Special Assistant U. S. Attorney,

Attorneys for Plaintiff.

(Signed) HAMBLÉN & GILBERT,

Attorneys for Defendant.

Endorsements: Stipulation.

Filed June 29th, 1914.

W. H. HARE, Clerk.

By F. C. Nash, Deputy.

Order Settling and Allowing Bill of Exceptions

The foregoing Bill of Exceptions, duly and within the time allowed by law, proposed by defendant, is hereby upon stipulation of the parties hereto, duly settled and allowed as defendant's bill of exceptions, and it is certified that the same contains the entire record submitted to the court and that same contains all evidence introduced upon the case and upon which the judgment of the court was rendered.

Dated this 3d day of August, A. D. 1914.

(Signed) Frank H. RUDKIN,

United States District Judge who presided at the trial of said cause.

Endorsements: Bill of Exceptions.

Received at the Clerk's office May 27, 1914, and filed, after being settled and allowed by Court, in the U. S. District Court for the Eastern District of Washington, August 3, 1914.

W. H. HARE, Clerk.

By Frank C. Nash, Deputy.

*In the District Court of the United States, Eastern
District of Washington, Northern Division.*

No. 1751.

OREGON-WASHINGTON RAILROAD & NAVI-
GATION COMPANY, a Corporation,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

AT LAW.

Petition for Writ of Error

And comes now the plaintiff in error, Oregon-Washington Railroad & Navigation Company, a corporation, (defendant in the action), and says, that on or about the 27th day of May, A. D. 1914, the above entitled District Court entered a judgment herein in favor of the plaintiff, United States of America, and against the defendant, Oregon-Washington Railroad & Navigation Company, in which judgment and the proceedings had prior thereto in this cause, certain errors were committed to the prejudice of this defendant, all of which will more in detail appear from the Assignment of Error which is attached to and filed with this petition.

WHEREFORE, this defendant prays that a Writ of Error may issue in this behalf out of the United States Circuit Court of Appeals for the Ninth Circuit, for the correction of errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the United States Circuit Court of Appeals

for the Ninth Circuit at San Francisco, California.

(Signed) A. C. SPENCER,

(Signed) HAMBLÉN & GILBERT,

Attorneys for Plaintiff in Error, Oregon-Washington Railroad & Nav. Co.

*In the District Court of the United States, Eastern
District of Washington, Northern Division.*

No 1751.

OREGON-WASHINGTON RAILROAD & NAVI-
GATION COMPANY, a Corporation,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

AT LAW.

Assignment of Error

Plaintiff in error, the Oregon-Washington Railroad & Navigation Company, hereby assigns the following errors committed by the trial court:

1. The trial court erred in overruling and denying the motion of the defendant made at the close of the case for judgment in its favor, which motion was made upon the ground that upon the admitted and stipulated facts in the case, no violation of law upon which the cause of action herein is based has been established, but to the contrary, the plaintiff had failed to make out or establish its cause of action upon any count alleged.

2. The trial court erred in entering judgment for the plaintiff upon the stipulation filed herein.

WHEREFORE, the plaintiff in error prays that said judgment of the District Court be reversed and the said District Court ordered to enter judgment dismissing the action.

(Signed) A. C. SPENCER,

(Signed) HAMBLÉN & GILBERT,

Attorneys for Plaintiff in Error.

On consideration of the foregoing petition and assignments of error attached thereto, the Court does allow the Writ of Error to Defendant, Oregon-Washington Railroad & Navigation Company, upon giving bond according to law in the sum of Fifteen Hundred and no-100 Dollars (\$1500.00), which shall operate as a supersedeas bond.

Dated this 4th day of August, 1914.

(Signed) FRANK H. RUDKIN,

United States District Judge for the Eastern District of Washington, Norther Division, who tried said cause and entered said judgment.

Endorsements: Petition for Writ of Error, Order Allowing Writ of Error and Assignment of Errors.

Filed in the U. S. District Court for the Eastern District of Washington, August 4, 1914.

W. H. HARE, Clerk.

By Frank C. Nash, Deputy.

*In the District Court of the United States for the
Eastern District of Washington, Northern Division.*

No. 1751.

OREGON-WASHINGTON RAILROAD & NAVI-
GATION COMPANY, a corporation,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

AT LAW.

Writ of Error

(Lodged Copy)

The United States of America, Ninth Judicial District,
—ss.

The President of the United States, to the Honorable
Judge of the District Court of the United States,
for the Eastern District of Washington, Northern
Division, Greeting:—

Because in the record and proceedings, as also
in the rendition of the judgment, of a plea which is
in the said District Court before you, between the
United States of America, plaintiff, and the Oregon-
Washington Railroad & Navigation Company, a cor-
poration, defendant, a manifest error hath happened,
to the great damage of the said defendant, the Oregon-
Washington Railroad & Navigation Company, a cor-
poration, as by its complaint appears, we being willing
that error, if any hath been, should be duly corrected,
and full and speedy justice done to the parties afore-
said in this behalf do command you, if judgment be
therein given that then under your seal, distinctly
and openly, you send the record and proceedings afore-

said, with all things concerning the same, to the United States Circuit Court of Appeals, for the Ninth Circuit, together with this writ, so that you have the same at San Francisco on the First day of September, 1914, in the said Circuit Court of Appeals for the Ninth Circuit, to be then and there held, that the record and proceedings being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error what of right, and according to the laws and customs of the United States, should be done.

WITNESS, the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States, this 4th day of August, in the year of our Lord one thousand nine hundred and fourteen.

(Signed) W. H. HARE,
Clerk U. S. District Court for the Eastern District
of Washington, Northern Division.

By Frank C. Nash, Deputy.

(SEAL)

ALLOWED BY:

FRANK H. RUDKIN, Judge.

Endorsements: Service Accepted this 4th day of August, 1914.

(Signed) F. A. GARRECHT,
U. S. Attorney.

Writ of Error (Lodged Copy.)

Filed in the U. S. District Court for the Eastern District of Washington, August 4, 1914.

W. H. HARE, Clerk.

By Frank C. Nash, Deputy.

*In the United States District Court, for the Eastern
District of Washington, Northern Division.*

No. 1751.

OREGON-WASHINGTON RAILROAD & NAVI-
GATION COMPANY, a corporation,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error,

AT LAW.

Supersedeas and Cost Bond on Writ of Error

KNOW ALL MEN BY THESE PRESENTS,
that we, Oregon-Washington Railroad & Navigation
Company, (a corporation) as Principal, and National
Surety Company, (a corporation organized under the
laws of the State of New York for the purpose of
doing business as a surety, and which has complied
with the statutes of the United States authorizing it
to become a surety of bonds in the Courts of the
United States) as surety, are held and firmly bound
unto the United States of America in the just and
full sum of Fifteen Hundred Dollars (\$1500.00),
to be paid unto the said above named United States
of America, its attorneys, officers or assigns, to which
payment, well and truly to be made, we bind ourselves,
our successors and our assigns jointly and severally,
firmly by these presents.

Sealed with our seals and dated this 3d day of
August, A. D. 1914.

Upon the conditions that:

WHEREAS, lately at a session of the United States District Court for the Eastern District of Washington, Northern Division, in a suit pending in said court between the United States of America and the Oregon-Washington Railroad & Navigation Company, a corporation, a judgment was rendered against said defendant in the sum of One Thousand (\$1000.00), and costs amounting to Forty-four and 43-100 dollars (\$44.43); and,

WHEREAS, said defendant conceiving itself aggrieved thereby, has obtained from said Court a Writ of Error to reverse and correct said judgment in that behalf and a citation directed to the above named defendant in error admonishing said defendant in error to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit to be holden at San Francisco, in the State of California within the time therein fixed; and,

WHEREAS, an order has been entered requiring said defendant to file supersedeas bond and cost bond in the aggregate sum of fifteen hundred dollars (\$1500.00);

NOW, the condition of the above obligation is such that if the said Oregon-Washington Railroad & Navigation Company, a corporation, shall prosecute its said writ of error to effect, and answer all damages and costs if it fails to make its plea good in said court, then the above obligation to be void; otherwise to remain in full force and virtue.

This bond is intended as a bond for costs on appeal and as a Supersedeas Bond.

(Signed) OREGON-WASHINGTON RAILROAD
& NAVIGATION CO.,

By HAMBLÉN & GILBERT,

Its Agents and Attorneys.

(Signed) NATIONAL SURETY CO., OF N. Y.,

By JAMES A. BROWN,

Resident Vice President.

Attest: F. L. Jones, Res. Asst. Secty.

The foregoing Bond is hereby approved this 4
day of August, 1914, and the same when filed shall
operate as a bond for costs on appeal and as a
Supersedeas Bond.

(Signed) FRANK H. RUDKIN,

Judge.

Endorsements: Supersedeas Bond and Cost Bond
on Writ of Error.

Filed in the U. S. District Court for the Eastern
District of Washington, August 4, 1914.

W. H. HARE, Clerk.

By Frank C. Nash, Deputy.

*In the District Court of the United States for the
Eastern District of Washington, Northern Division.*

No. 1751.

OREGON-WASHINGTON RAILROAD & NAVI-
GATION COMPANY, a corporation,

Plaintiff in Error,

v.s.

UNITED STATES OF AMERICA,

Defendant in Error,

AT LAW.

Citation on Writ of Error

(Lodged Copy.)

United States of America,

Eastern District of Washington,—ss.

TO THE UNITED STATES OF AMERICA. and
to Francis A. Gerrecht, its Attorney, Greeting:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty (30) days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the Circuit Court of the United States, Eastern District of Washington, Northern Division, wherein the Oregon-Washington Railroad & Navigation Company, a corporation, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand at Spokane in said district, this 4th day of August, 1914.

(Signed) FRANK H. RUDKIN,

(SEAL)

Judge.

Endorsements: Service of within Citation accepted this 4th day of August, 1914.

(Signed) F. A. GARRECHT, U. S. Attorney.

Citation. (Lodged Copy.)

Filed in the U. S. District Court for the Eastern District of Washington, August 4, 1914.

W. H. HARE, Clerk.

By Frank C. Nash, Deputy.

*In the District Court of the United States, Eastern
District of Washington, Northern Division.*

No. 1751.

UNITED STATES OF AMERICA,

Plaintiff,

v's.

OREGON-WASHINGTON RAILROAD & NAVI-
GATION COMPANY, a Corporation,

Defendant.

Praeceptum for Transcript

To the Clerk of the above-entitled Court:

You will please prepare transcript of the complete record in the above-entitled case to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Judicial Circuit, under the writ of error to be perfected to said court, and include in said transcript the following proceedings, pleadings, papers, records and files, to-wit:

1. Complaint.
2. Answer.
3. Stipulation of Agreed Statement of Facts.
4. Stipulation Waiving Trial by Jury.
5. Opinion.
6. Judgment.
7. Bill of Exceptions and Certificate.
8. Assignment of Errors.
9. Petition for Writ of Error.
10. Order Allowing Writ of Error and fixing Bond.
11. Supersedeas Bond and Bond for Costs.
12. Citation.
13. Writ of Error.

14. Praecipe for Transcript of Record.

16. Stipulation Extending time to file Bill of Exceptions.

—and any and all records, entries, pleadings, proceedings, papers, filings necessary or proper to make a complete record upon said writ of error in said cause. Said transcript to be prepared as required by law and the rules of this court and the rules of the United States Circuit Court of Appeals for the Ninth Judicial Circuit.

(Signed) ARTHUR C. SPENCER and
HAMBLÉN & GILBERT,

Attorneys for Defendant.

Endorsements: Praecipe for Transcript of the Record.

Filed in the U. S. District Court for the Eastern District of Washington, August 11, 1914.

W. H. HARE, Clerk.

By Frank C. Nash, Deputy.

*In the District Court of the United States, Eastern
District of Washington, Northern Division.*

No.-----

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD & NAVI-
GATION COMPANY, a Corporation,

Defendant.

**Certificate of Clerk of U. S. District Court to
Transcript of Record**

UNITED STATES OF AMERICA,

Eastern District of Washington,—ss.

I, W. H. HARE, Clerk of the District Court of the United States for the Eastern District of Washington, do hereby certify that the foregoing printed pages, numbered from 1 to 44, inclusive, constitute, and are a true and correct copy of the record, pleadings, testimony and all proceedings had in said action as called for by the defendant and the plaintiff in error in its praecipe for a transcript of the record herein, as the same remain on file and of record in said District Court, and that the same which I transmit constitute my return to the annexed Writ of Error lodged and filed in my office on the 4th day of August, 1914. I also annex and transmit the original citation in said action.

I further certify that the cost of preparing, certifying and printing the foregoing transcript and record amounts to the sum of \$56.00, which sum has

been paid in full by Hamblen & Gilbert, attorneys for defendant and plaintiff in error.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court at the city of Spokane, in the Eastern District of Washington, Northern Division, in the Ninth Judicial Circuit, this 25th day of August, 1914, and in the Independence of the United States of America, the one hundred and thirty-ninth.

(Signed) W. H. HARE,
Clerk, U. S. District Court for the
Eastern District of Washington.

(SEAL)